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11 TEACHSCAPE, INC.

12 IN THE UNITED STATES DISTRICT COURT
13 FOR THE NORTHERN DISTRICT OF CALIFORNIA

14 CANTER & ASSOCIATES, LLC, and
15 LAUREATE EDUCATION, INC.,

16 Plaintiff,

17 vs.

18 TEACHSCAPE, INC.,

19 Defendant.

Case No. C 07 3225 RS

**DEFENDANT TEACHSCAPE, INC.'S
OPPOSITION TO PLAINTIFFS' MOTION
TO COMPEL INITIAL DISCLOSURES**

Date: January 9, 2008

Time: 9:30 a.m.

Ctrm: 4 (5th Floor)

Judge: The Honorable Richard Seeborg

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I. INTRODUCTION

Plaintiffs filed the present motion to compel initial disclosures claiming Teachscape's failure to provide its disclosures was without substantial justification and in violation of the law. Plaintiffs' motion is unnecessary and ironically, itself filed contrary to this Court's rules.

As set forth below, Plaintiffs' motion should be denied for a myriad reasons. Federal Rule of Civil Procedure 26(f) expressly provides that a party may defer initial disclosures if it objects to such disclosure and the objection is noted in the joint statement. Teachscape sought to avail itself of this proper procedure but were rebuffed by Plaintiffs. Further, Plaintiffs failed to comply with this Court's "meet and confer" obligations regarding both the substance of the motion and any hearing date.

At the time of Plaintiffs' filing, this Court had under submission Teachscape's motion to dismiss, which not only identified the lack of clarity and substance to Plaintiffs' complaint, but also called into question this Court's jurisdiction to hear the present matter. Teachscape notified Plaintiffs that it felt that making initial disclosures were premature with the motion to dismiss pending, and in any event, that such disclosures were not due until the Court-ordered joint case management conference statement ("CMC") was due. This was Teachscape's position before, during and after the parties' Rule 26(f) conference. (*See Declaration of Gayle M. Athanacio In Support Of Opposition To Motion To Compel Initial Disclosures And Opposition To Motion For Protective Order ("Athanacio Decl."), Ex. E ("As to the protective order and initial disclosures, our position is that both are premature in light of our pending motion to dismiss/strike and the court's continuance of the CMC")*) (emphasis added).) The joint statement in this case was not due until today. But rather than note Teachscape's objections in the joint statement and/or set forth their assertion that the initial disclosures were overdue, Plaintiffs filed the present motion to compel.

This Court has now concluded Plaintiffs' Complaint was defective and that presently, Plaintiffs have failed to state a claim which would afford federal jurisdiction in this case.

Teachscope has violated neither the letter nor spirit of Rule 26 and certainly never intentionally violated any Court order or rule. Plaintiffs' motion is unwarranted and should be denied.

II. FACTUAL BACKGROUND

Plaintiffs' present federal action is predicated on the viability of two federal claims—Copyright Infringement and False Advertising under the Lanham Act. Plaintiffs justified their failure to substantiate their copyright claim on Teachscope's alleged "unreasonable" refusal to provide Plaintiffs access to the allegedly infringing material, namely certain course offerings by Marygrove College. In connection with its motion to dismiss, Teachscope presented indisputable evidence that showed that in reality, Teachscope had reasonably proposed an "apples to apples" exchange of course material and that this reasonable offer was summarily rejected by Plaintiffs.

At the hearing on the motion to dismiss, this Court expressed skepticism at Plaintiffs' assertion that because they could not view drafts of the allegedly offending work, their filing of the present action was viable. After the conclusion of the hearing, Teachscope's counsel approached Plaintiffs to revisit the issue of a mutual exchange of course material so that Plaintiffs could see for their own eyes the case against Teachscope lacked merit. (*Id.*, ¶ 9.) Plaintiffs' counsel flatly rejected the offer. (*Id.*) When Teachscope's counsel reiterated its position that it made no sense to actively litigate this action while the Court's jurisdiction was in question, Teachscope's counsel responded that it was prepared to engage in "scorched earth" litigation. (*Id.*, ¶ 10.) *Those were Plaintiffs' counsel's exact words.* (*See id.*) A week later, Plaintiffs proposed that Teachscope *unilaterally* produce all Marygrove final course material (which was defined as either final or latest versions), along with the "first draft" of all of the same. (*Id.*, ¶ 11, Ex. F.) Teachscope found this offer unacceptable. (*Id.*, ¶ 12, Ex. G.)

Subsequently, on October 15, 2007, the parties conducted their Rule 26 conference. (*Id.*, ¶ 13.) During that conference, Teachscope's counsel repeatedly asserted that any activity, including discovery, scheduling, and trial setting, was premature and impractical with Teachscope's motion to dismiss pending. (*Id.*) Teachscope attempted to work with Plaintiffs to

1 discuss the parameters of a joint case management statement. (*Id.*) Teachscope did not
 2 withdraw its prior objection that initial disclosures or further activity in this case should be
 3 deferred pending a decision by the Court regarding its jurisdiction and did not agree to a date on
 4 which it would make its initial disclosures. (*Id.*)

5 Nonetheless, in an effort to dissuade Plaintiffs from engaging in the “scorched earth”
 6 litigation tactic they threatened, Teachscope did offer, *after the conference* but *before* any joint
 7 statement was submitted, to serve its initial disclosures on the same day the joint statement was
 8 due, October 31, 2007, “absent an order from the court.” (*Id.*, ¶ 14.) Teachscope selected this
 9 date as Teachscope understood, consistent with the Court’s initial case management order, the
 10 Court expected the parties to make initial disclosures on or before the day the joint CMC
 11 statement was submitted to the Court. (*Id.*) Prior to filing the present motion, Plaintiffs never
 12 responded to the proposal Teachscope set forth in the draft Joint CMC statement. (*Id.*)

13 On October 30, this Court continued the CMC to December 19, 2007, with the joint
 14 statement due on December 12. Teachscope did not serve its initial disclosures on October 31 in
 15 light of the Court’s order continuing the CMC and because Teachscope was contending with
 16 responding to Plaintiffs’ hand-served document requests, which included *80 separate document*
 17 *demands*, and a notice of deposition under Fed. R. Civ. P. 30(b)(6), unilaterally noticing
 18 Teachscope’s deposition on topics, which when subparts are included, includes *over 80 areas of*
 19 *inquiry*. (*See id.*, ¶¶ 15-17.)

20 On October 30, Teachscope promptly notified Plaintiffs that it would not be making its
 21 initial disclosures on October 31 and noted that the joint case management conference statement
 22 would need to be revised. (*Id.*, ¶ 17; *See Declaration of Elena DiMuzio In Support of Plaintiff’s*
 23 *Motion To Compel Initial Disclosures (“DiMuzio Decl.”), Ex. A.) Plaintiffs did not revise the*
 24 *joint statement to reflect their contention that Teachscope’s initial disclosures were overdue.*
 25 Instead, on November 9, Plaintiffs sent an e-mail in which they demanded that Teachscope
 26 provide a “date certain” by which Teachscope provide its initial disclosures, or else Plaintiffs
 27 would move to compel. (*See DiMuzio Decl., Ex. C.*)

1 On November 15, 2007, before Teachscope responded to their e-mail, and without
2 contacting Teachscope regarding a hearing date for their threatened motion, Plaintiffs' filed their
3 motion to compel, unilaterally setting a hearing date of *December 26, 2007*. (Athanacio Decl., ¶
4 18.) On November 28, before Teachscope responded to Plaintiffs' most recent actions (due to
5 the Thanksgiving holiday), Plaintiffs filed, again without notifying Teachscope of their intended
6 hearing date, a motion for protective order. Plaintiffs set this motion for January 2, 2007. (*Id.*, ¶
7 19.)

8 On November 29, 2007, Teachscope contacted Plaintiffs' counsel to object to the filing of
9 the motion to compel. (*Id.*, ¶ 20, Ex. H.) Teachscope noted that there was no "meet and confer"
10 prior to the filing of the motion and that Plaintiffs violated this Court's local rule when it filed
11 the motion without first contacting Teachscope regarding the proposed December 26th hearing
12 date, a date not surprisingly on which Teachscope's counsel was unavailable. (*Id.*) Most
13 importantly, Teachscope reiterated its prior objections to the timing of initial disclosures and its
14 belief that its disclosures were not overdue. (*Id.*) Teachscope also instructed Plaintiffs to revise
15 the draft joint statement (which they had in their possession for nearly a month) consistent with
16 Rule 26, to reflect Teachscope's objection and the parties' dispute, so that the matter could be
17 addressed at the CMC, as contemplated by Rule 26. (*Id.*) Plaintiffs responded by asserting that
18 all of Teachscope's assertions were "meritless." (*Id.*, ¶ 21, Ex. I.) Only when Teachscope made
19 its initial disclosure when "in accordance with Rule 26(a)" would Plaintiffs withdraw their
20 motion. (*Id.*) Plaintiffs offered only to move the hearing on its motion to January 2, 2008. (*Id.*)

21 Teachscope responded by again noting that there was no reason to file the motion when
22 "[t]he joint case management conference statement (which has yet to be filed) will note the
23 current difference of opinion as to the timing/appropriateness of Teachscope's initial disclosures
24 based on its pending motion to dismiss." (*Id.*, ¶ 22, Ex. J.) Teachscope further noted that its
25 counsel was unavailable for a hearing the day after New Years' Day, as Plaintiff had unilaterally
26 set the January 2, 2008 hearing date. (*Id.*) Rather than agree to renote their motions, Plaintiffs
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1 suggested that if Teachscape agree to then existing briefing schedule and prepare a stipulation,
2 they would agree to move the hearing to January 9, 2008. (*See id.*, ¶ 23.)

3 Ultimately, Teachscape negotiated a stipulation to continue the hearing on Plaintiffs'
4 motions to January 9. (*Id.*) This court entered the parties' proposed order, allowing both
5 Plaintiff's Motion To Compel Initial Disclosures and Motion For Protective Order to be heard
6 on January 9, 2008.

7 **III. ARGUMENT**

8 **A. Teachscape's Initial Disclosures Are Not Untimely.**

9 Federal Rule of Civil Procedure 26 expressly recognizes that the appropriateness and
10 timing of initial disclosures may vary depending on the nature of the litigation. Specifically,
11 Rule 26 states that "[t]hese disclosures must be made at or within 14 days after the Rule 26(f)
12 conference unless a different time is set by stipulation or court order, or unless a party objects
13 during the conference that initial disclosures are not appropriate in the circumstances of the
14 action and states the objection in the Rule 26(f) discovery plan. In ruling on that objection, the
15 court must determine what disclosures — if any — are to be made, and set the time for
16 disclosure." Fed. R. Civ. P. 26(a)(1).

17 Teachscape told Plaintiffs that it objected to initial disclosures when its motion to dismiss
18 was pending. Teachscape further made it known that it also believed that the Court's Order
19 reflected that the initial disclosures were to made at or before the same time the joint report was
20 submitted to the Court. As such, Teachscape believed the time for initial disclosures is currently
21 December 12, the date the joint statement is due.

22 Yet, before any joint CMC report was finalized or submitted, Plaintiffs filed their motion
23 to compel initial disclosures. Teachscape requested that the joint statement, while still being
24 drafted, reflect the dispute over the timing of Teachscape's initial disclosure but Plaintiffs
25 refused to proceed on this basis. That Teachscape, in an effort to forestall further dispute and
26 the "scorched earth" litigation Plaintiffs threatened to engage in, proposed that it would make
27 initial disclosures on the date the joint statement was due, in no way detracts from the simple
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fact that Plaintiffs should never have filed the present motion. The issue—such as it is—should have been resolved as Teachscape proposed and as provided for in Rule 26, by raising the dispute in the joint statement and simply addressing the issue at the CMC. Indeed, this Court's Standing Order on the content of joint CMC statements specifically notes that the joint statement will address whether there has been "full and timely compliance with the initial disclosure requirements of Fed. R. Civ. P. 26...." Standing Order For All Judges Of The Northern District Of California, Contents Of Joint Case Management Statement, No. 7.

The proper procedure as expressly contemplated by Rule 26 and this Court's Standing Order is for the issue of initial disclosures to be brought to the Court's attention via the CMC joint report. It has been. For this reason alone, Plaintiffs' motion should be denied.

B. Teachscape's Position Was Substantially Justified.

Even if Teachscape's initial disclosures were technically previously due, which Teachscape disputes, Teachscape's actions in this case were substantially justified. A party meets the "substantially justified" standard where there is a "genuine dispute" or if "reasonable people could differ" as to the appropriateness of the motion. *Peterson v. Hantman*, 227 F.R.D. 13, 16 (D.D.C. 2005) (quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988), which noted that Fed. R. Civ. P. 37(a)(4) and (b)(2)(E) have never been described as meaning "justified to a high degree," but rather the "substantially justified" test has been said to be satisfied if there is a "genuine dispute" or if "reasonable people could differ as to the appropriateness of the contested action"). A party's actions are substantially justified if the issue presented is one that could "engender a responsible difference of opinion among conscientious, diligent, but reasonable advocates." *Id.*

As previously noted, Teachscape reasonably believed that its objections to the appropriateness and timing of its initial disclosures was a matter properly resolved at the CMC and that the Court's consideration of Teachscape's motion to dismiss which called into question federal jurisdiction warranted that the issue be addressed in this fashion. This position was reasonable and based upon the language of both Rule 26 and this Court's Standing Order. It

1 proved more than reasonable when this Court granted Teachscope's motion to dismiss. Further,
 2 when this Court continued the CMC, and moved the date for submission of the joint statement,
 3 Teachscope believed that its initial disclosures made on the Court's newly-set date for the joint
 4 statement – December 12 – would be timely. This understanding is not unreasonable. Indeed,
 5 as a leading practice guide recognizes: "The presumptive disclosure date is the same date as the
 6 date on which the parties are required to submit to the court their report on their Rule 26(f)
 7 conference." 6-26 Moore's Federal Practice - Civil § 26.22[5][a] (2007).

8 Teachscope's actions with regard to its initial disclosures was appropriate and certainly, at
 9 a minimum, substantially justified. For this additional reason, Plaintiffs' motion to compel
 10 should be denied.

11 **C. Plaintiffs' Motion Should Be Denied For Their Own Failure to Comply**
 12 **With This Court's Rule.**

13 Plaintiffs filed the present motion in violation of at least four of this Court's rules.
 14 First, as previously noted, the proper, and certainly most efficient and expeditious manner in
 15 which to raise the issue of Teachscope's initial disclosures was to note the matter in the Joint
 16 CMC Statement. *See* Fed. R. Civ. P. 26(a)(1). Plaintiffs' refused to do so. This was
 17 inappropriate. Secondly, this Court's rules expressly provide that prior to filing a motion,
 18 Plaintiffs' must confer to ensure the proposed date for the hearing does not cause opposing
 19 counsel any undue prejudice. San Jose Division Standing Order, 1:20-21. Plaintiffs filed the
 20 motion for the day after Christmas without consulting Teachscope's counsel. This, too, is a
 21 clear violation of Court rules. Third, this Court's rules mandate that the parties "meet and
 22 confer" prior to filing the motion. N.D. Cal. Civil L.R. 1-5(n), 37-1. Teachscope respectfully
 23 submits that the single e-mail—which Plaintiffs gave Teachscope an ultimatum—does not
 24 constitute an effort to meet and confer. Certainly, Plaintiffs' refusal to drop their motion so that
 25 the matter could simply be resolved at the CMC, which was scheduled to be held before the
 26 current CMC date, demonstrates a failure to "meet and confer" in good faith.

27 Lastly, in their proposed order, Plaintiffs request an award of attorneys' fees. This back-
 28 door request violates Local Rules 7-2, 7-8 and 37-3.

1 **IV. CONCLUSION**

2 While Teachscape would have preferred to avoid burdening this Court with the painful
3 history of the parties' dealings, Teachscape felt compelled to file the present opposition as
4 Plaintiffs have suggested that Teachscape deliberately flouted this Court's orders and rules, and
5 engaged in inappropriate dilatory tactics. Plaintiffs' suggestion, as is the present motion, is
6 simply unfounded.

7 Despite Plaintiffs' claims to the contrary, Teachscape has not violated either the letter or
8 spirit of this Court's rules and Order. To the contrary, Teachscape sought to allow this Court the
9 time it needed to rule on Teachscape's motion to dismiss so that the parties could proceed, if
10 necessary, in an orderly fashion and with guidance from the Court. Teachscape proposed that
11 the issues regarding case management, and its initial disclosures, be deferred until the Court
12 ruled on Teachscape's motion and/or until the Case Management Conference was held, so that
13 rather than "paper" the file and burden the Court with formal motions, the matter could be
14 addressed in a reasonable and orderly fashion. Plaintiffs rejected this proposal. Instead,
15 Plaintiffs have filed the present motion, a motion for protective order and propounded 80
16 document requests and a deposition notice under FRCP 30(b)(6) that identifies upwards of 80
17 different topics. Teachscape is not trying to delay this action. Plaintiffs are trying to bury
18 Teachscape.

19 Teachscape firmly believes that any discussion regarding case management and discovery
20 makes little sense with the Court's jurisdiction in question. Teachscape has consistently
21 communicated its belief to Plaintiffs' counsel. Plaintiffs consider Teachscape's desire to have
22 the Court rule on its motion to dismiss and discuss case management issues at the Case
23 Management Conference an unwarranted delay tactic. Teachscape submits that its proposal is
24 infinitely reasonable, appropriate and consistent with this Court's Orders.

1 Plaintiffs motion to compel initial disclosures is without basis in fact or law. Plaintiffs'
2 motion should be denied.

3 DATED: December 12, 2007

SONNENSCHN NATH & ROSENTHAL LLP

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5 By: /S/
6 GAYLE M. ATHANACIO

7 Attorneys for Defendant
8 TEACHSCAPE, INC.
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